Supreme Court, U.S.
FILED
JUN 4 2001
CLERK

No. 00-1397

In The

Supreme Court of the United States

UAL CORPORATION, dba UNITED AIRLINES,

Petitioner,

v.

JOANNE FIELDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

THAD M. GUYER
Counsel of Record
T.M. GUYER & FRIENDS, P.C.
225 West Main Street
Medford, OR 97501
(541) 773-9656

June 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTION PRESENTED, AND STATEMENT OF RELATED QUESTIONS NOT PRESENTED

The question presented by the petition can be fairly restated as follows:

> Whether the Ninth Circuit correctly held that the discovery injury rule does not bar recovery for otherwise untimely claims where a related continuing discriminatory or retaliatory *act*, or related continuing discriminatory or retaliatory *unlawful employment practice* has occurred within the 300 day EEOC filing deadline.

The single question presented by the petition is narrow, and does not seek review of the following questions resolved by the court below:

> (1) Whether discriminatory retaliation by co-employees may create vicarious liability for an employer that knowingly fails to abate it.
>
> (2) Whether retaliatory acts not rising to the level of ultimate employment decisions or traditional adverse personnel actions may in and of themselves be actionable retaliatory discrimination under 42 USC 2000e-3(a), irrespective of the preexistence of a hostile work environment.
>
> (3) Whether the same discrete act or failure to act by an employer may be simultaneously actionable as both sex discrimination under section 2000e-2(a)(1), and as retaliatory discrimination under section 2000e-3(a).
>
> (4) Whether a constructive discharge may be actionable as sex discrimination under section 2000e-2(a)(1), or as retaliatory discrimination under section 2000e-3(a), where a continuing hostile work environment exists by virtue of the

RESTATEMENT OF QUESTION PRESENTED, AND STATEMENT OF RELATED QUESTIONS NOT PRESENTED – Continued

employer's failure to abate it, combined with subsequent discriminatory or retaliatory acts occurring within the 300 day EEOC filing deadline.

If this Court decides to grant certiorari, it should consider requiring the petitioner to brief one or more of the above unraised issues.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED, AND STATEMENT OF RELATED QUESTIONS NOT PRESENTED i

ADDITIONAL STATUTORY PROVISIONS INVOLVED 1

ADDITIONAL STATEMENT 3

A. Fielder's Employment at United and the Nature of Her Claims 3

B. Proceedings Below 7

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH OTHER CIRCUITS' NARROW APPROACHES TO THE CONTINUING VIOLATION DOCTRINE 8

II. THE DECISION OF THE COURT OF APPEALS IS NOT ERRONEOUS 8

A. Overview of the Ninth Circuit's Test of Relatedness 8

B. The *Berry* Rule as Originally Formulated and First Tested 10

C. The *Berry* Rule Two Decades Later in the Fifth Circuit 18

D. The *Berry* Rule and its Even More Harsh Applications in Other Circuits 23

III. THE SCOPE OF ANY "CONTINUING VIOLATION" EXCEPTION TO SECTION 706(E) IS AN IMPORTANT AND FREQUENTLY LITIGATED ISSUE, BUT THE TEXT AND LEGISLATIVE HISTORY OF TITLE VII ITSELF PROVIDES THE GUIDANCE FOR AFFIRMING THE DECISION BELOW 25

TABLE OF CONTENTS – Continued

Page

A. Congressional Guidance 26

B. Applicable Supreme Court Cases on Proper Approaches on Limitations Issues 28

C. Applicable Supreme Court Cases on Continuing Violation Doctrine and Discovery 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Basemore v. Friday, 478 U.S. 385 (1986) 29

Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) 19

Burnett v. Grattan, 468 U.S. 42 (1984) 28

Crawford v. Western Electric Co., 614 F.2d 1300 (5th Cir. 1980) 12

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983) 28

Goodman v. Lukens Steel Co., U.S. 656 (1987) 27

Gregory v. Daly, 243 F.3d 687 (2nd Cir. 2001) 19

Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968) 30

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 28

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 28

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 27

Miller v. Maxwell's Int'l, 991 F.2d 583 (9th Cir. 1993) 19

Rotella v. Wood, 528 U.S. 549 (2000) 20

United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) 11

United States v. Kubrick, 444 U.S. 111 (1979) 28

Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) 15

TABLE OF AUTHORITIES – Continued

Page

Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A., 139 F.3d 532 (5th Cir. 1998) 18

Wilson v. Garcia, 471 U.S. 261 (1985) 28

STATUTES

42 USC Sec. 1981 27

42 USC Sec. 1981a 2, 26

42 USC Sec. 1981a(a)(1) 27

42 USC Sec. 1988 ..... 2, 26

42 USC Sec. 2000e-2 ..... 1, 27

42 USC Sec. 2000e-3 1

42 USC Sec. 2000e-5 ..... 1, 26, 27

42 USC Sec. 2000e-5(e)(1) 27

42 USC Sec. 2000e-5(g)(1) 26

42 USC Sec. 3612(a) 29

OTHER AUTHORITIES

Act Mar. 24, 1972, P.L. 92-261, 86 Stat. 113 26

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the single statutory provision identified by the petitioner governing timely filing of EEOC charges, the following statutory provisions are also involved:

42 USC Sec. 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) * * * to discharge any individual, otherwise to discriminate against any individual with respect to his * * * terms, conditions, or privileges of employment, because of such individual's * * * sex * * *

42 USC Sec. 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges * * *

It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter * * * .

42 USC Sec. 2000e-5. Enforcement provisions

* * *

*(e) Time for filing charges; * * * seniority system*

* * *

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system * * * when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

*(g) Injunctions; * * * accrual of back pay;*

(1) If the court finds that the respondent has intentionally engaged in * * * an unlawful

employment practice charged in the complaint, the court may * * * order * * * any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. * * *

42 USC Sec. 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 USC 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination * * * (42 USC 2000e-2, 2000e-3, 2000e-16), * * * the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 USC § 1988 [Application of Analogous Federal and State Limitations]

The jurisdiction in civil * * * matters conferred on the district courts by the provisions of this chapter * * * for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies * * * statutes of the State * * * shall be extended to and govern the said courts in the trial and disposition of the cause * * *

ADDITIONAL STATEMENT

The respondent adds the following facts, from the record below, and challenges certain misstatements of the record:

A. Fielder's Employment at United and the Nature of Her Claims:

(1) *Scope of the Amended Complaint*: The petition makes the following misstatement of the record at page 7:

> In response to Fielder's claim that the continuing violation doctrine allowed her to recover for alleged incidents dating back to 1984, the district court turned to the three *Berry* factors.

Respondent has not taken the position that she could "recover for alleged incidents dating back to 1984". Her amended complaint specifically alleges that the hostile working condition commenced with the obscene phone calls on February 15, 1993. Her complaint references none of the earlier acts of sexual harassment, intimidation, and retaliation prior to that date. The earlier acts appear in the record in the context of background information presented by both parties during the summary judgment proceedings.

(2) *Linkage of the Continuing Sex Discrimination and Retaliation*: The petition makes the following misstatement of the record at page 13:

> * * * Fielder complained principally about sexual harassment, and to a lesser extent coworker retaliation, before the limitations period, but complained only about the transfer of a coworker and one incident she characterizes as *retaliation* (Bibler's reprimand) that allegedly occurred within the limitations period.

The amended complaint, and the Ninth Circuit's treatment of it, is not an assertion of employer liability for failing to prevent the sexual comments, touching and phone calls. As the petition correctly states at pages 4 to 5:

> Fielder did not claim to have experienced any sexual harassment at all after February 1993, App., *infra*, 71a, but she did contend that several of her coworkers, including Reynolds, retaliated against her *for reporting Chmelir to Bibler and to the police, id.* at 6a, 59a. [Emphasis added.]

Ms. Fielder contends United is liable to her for sex discrimination due to its continuing failure to abate the hostile environment through the readily available means of either isolating Chmelir from her, or by granting her transfer to Portland or Seattle. This *failure to remedy* in April 1994 and after is the discrimination "because of sex", not the sexual comments, touching and phone calls in and prior to February 1993. United's giving the available transfer position to another employee within the 300 day EEOC filing period is linked by her and the Ninth Circuit as the continuing unlawful employment practice because of sex. As the court below stated in *Fielder* at 987 regarding its understanding of the respondent's positions regarding the transfer's continuing violation linkage to *sex discrimination*:

> We turn now to United's refusal to transfer Fielder. The refusal to transfer her may be evidence that United failed to take steps reasonably calculated to remedy a hostile work environment, *see Burrell, 170 F.3d at 955,* and this constitutes an overt act. Fielder expressed a willingness to move to a different city so that she could continue to work for United. She offered to remedy the problem by transferring, but United declined to take any action, thereby maintaining the *status quo* hostile environment. The brute fact is that a person with less seniority received the transfer. The transfer issue, too, presents a jury question *on the issues of discrimination and retaliation.* [Emphasis added].

Similarly, it is the *failure to remedy* the co-worker retaliation *following* her report to the employer and the police in February 1993 that is basis of her retaliation claims, not

the comments, refusals to coordinate duties, and ostracizing by her colleagues *per se*. United's giving the available transfer position to another employee within the 300 day EEOC filing period, and the effective revocation of her gate and workplace access privileges via the "poor judgment" reprimand, are linked by her and the Ninth Circuit as the continuing unlawful employment practice of retaliation both directly by Bibler (who is United), and indirectly in catering to co-workers who objected to Ms. Fielder's mere presence within the 300 day EEOC filing period. As the court below stated in *Fielder* at 986-87 regarding its understanding of the respondent's positions on the reprimand's continuing violation linkage to *unlawful employer retaliation*:

> It is also a disputed issue of fact whether Bibler's reprimand encouraged retaliatory behavior against Fielder by her co-workers. * * * If a jury finds that Bibler's reprimand was an act of retaliation, it becomes an issue of fact whether the retaliation was of the same kind alleged before the 300-day period. The retaliatory acts by management, before the period of limitations, were Bibler's refusal to prevent M.C. from bidding onto Fielder's shift before the diversion agreement, acting manager S.R.'s refusal to give her required job assistance and supervisor R.M.'s screaming at Fielder that she had her "head up her ass," telling her she was neurotic and sick and later telling her she was not welcome in the airport coffee shop. * * *

As the court below stated in *Fielder* at 987 regarding its understanding of the respondent's positions on the transfer's continuing violation linkage to *unlawful employer retaliation*: "The transfer issue, too, presents a jury question on the issues of discrimination *and retaliation*." (Emphasis added.)

(3) *Scope of the Remediation Sought from United*: The petition makes the following misstatement of the record at page 5:

> In April 1994, Fielder allegedly became concerned that Chmelir might attempt to bid onto her shift once his criminal diversion agreement expired. She claims that she discussed this concern with Bibler, seeking his assurance that Chmelir would be denied access to the same shifts that she was working."

In April 1994, Ms. Fielder did not demand that Chmelir be "denied access to the same shifts that she was working". She knew Bibler would not do that absent a criminal court order. As the letters of her first lawyer, James Mueller, successfully demanded, in 1993, before the criminal court diversion was in effect, Ms. Fielder had an employment expectation that the criminal offender would be isolated from her. Hence, she sought to make an alternative demand on Bibler in April 1994 that if Chmelir was allowed to work on her shift, that at least United should make reasonable efforts to keep him away from her during such shifts. As the majority noted in its recitation of the facts at *Fielder* at 980-81:

> Fielder went to Bibler and asked him "please, when the diversion agreement is up, please keep him away from me. I'm very much afraid of him." E.R. at 15. When M.C.'s criminal diversion program was coming to an end, she tried to arrange a meeting with Bibler, M.C. and others to work out an agreement regarding M.C.'s conduct if he were allowed to work on her shift. Fielder testified that she "wanted to iron out some safeguards for me, so that I could feel comfortable with M.C. on my shift. I had finally realized that there was nothing else I could do to keep him off of my shift. *So I thought, perhaps, if we have some concrete rules and regulations on paper, that everyone agrees to and signs, that we could work together.*" E.R. at 17. Bibler refused to hold the meeting. * * * Fielder was warned by M.C.'s diversion officer that he is "one of the scariest of his types, because he's smart enough

> to walk with one foot on both sides of the line." Plaintiff Depo. at 252. *Fielder testified that because of that statement and her past experiences, she was extremely worried that he might hurt her.* As a result of Bibler's refusal to have the meeting or otherwise guarantee her safety, Fielder went on medical leave April 20, 1994. She told Johnson she was leaving and that "there was just too much that had gone on, and she would not work at the Medford station again." E.R. at 27. Because her request for transfer was still pending, it is unclear if Fielder meant she would never work for United again or not in United's Medford station.

B. Proceedings Below

The dissenting judge in the proceedings below neither advocated, nor even mentioned, the appropriateness of application of the *Berry* factors to hostile work environment cases. Indeed, his dissent was most stinging over conflicting views with the majority as to the facts, not the law. The dissent stated in *Fielder* at 993:

> The majority is simply making up facts, simply making them up, to concoct a reason to get around the statute of limitations, when it says that "United's refusal to transfer Fielder" during the 300 days was one of "two overt acts" within the 300 days that would "trigger the operation of a continuing violation theory * * * "

The dissent opinion may add moral support to the petitioner in its cause before this Court. But it offers little help on what the law is or should be for continuing violation jurisprudence.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH OTHER CIRCUITS' NARROW APPROACHES TO THE CONTINUING VIOLATION DOCTRINE

Based upon the thorough and compelling petition as to the existence of a profound conflict within the circuits, and even within the panels of the circuits, there is no good faith basis upon which the respondent can argue the writ should not be granted on this ground, save one: The petition simply fails to present the scope of questions for review that should be before this Court to do justice to the limitations issue in the hostile work environment context of this case.

II. THE DECISION OF THE COURT OF APPEALS IS NOT ERRONEOUS

A. Overview of the Ninth Circuit's Test of Relatedness: As to the ground of erroneous decision as the basis for granting the writ, it is insufficient. The Ninth Circuit single prong rule that the continuing violation doctrine applies to allow actionability on otherwise untimely wrongs if they are closely related acts to those which are timely is strikingly in conformity to the decisions of this Court, both as to substance and as to simplicity. (See Section III.C. below) As the majority below articulated its rule in *Fielder* at 987-88:

> Generally, to determine whether the continuing violation doctrine applies, the question boils down to whether sufficient evidence supports a determination that the alleged discriminatory acts are related closely enough to the acts outside the limitations period.

(Citation, ellipses and brackets omitted.) This single prong test contains the first two prongs of the *Berry* rule, similarity and continuity. It is the third prong of the *Berry* test, as misconstrued by the later panels of the Fifth

Circuit and other courts since *Berry* itself, that should earn the disapproval of this Court for effectively eviscerating the continuing violation exception to timeliness with the wholly distinct injury discovery rule. Indeed, factor three of the *Berry* rule, which was explicitly formulated as a part of a non-exclusive test solely for measuring *relatedness*, has for many courts become a single prong test of both *timeliness and repose*. As the petition itself unwittingly reveals in its comprehensive review of diverse circuit law, outside of rote repetition of its first two factors, the *Berry* rule is now only its third prong. Indeed, some courts, attracted by the illusory *Berry* bright line, simply demure to the existence of the first two factors, and dismiss actions on a hostile environment 180 or 300 days from its inception.

Figuratively, some courts deploy the "most important" *Berry* prong in a way which views a hostile environment as nothing more than another "discrete act" in the form of a shrink-wrapped collection of words and acts which come in two measurable maximum sizes: the 180 day pack, or 300 day pack. Each plastic package bears a clear expiration date for being forever discarded, which is 180 or 300 days from the date a woman first felt herself to be a victim. If a woman has been groped each day for a calendar year in a 180 jurisdiction, there are three separate and distinct packages, the first two having 180 units each, and the third with only five units. The *Berry* prong then dictates that the first two packages are dismissed as stale. The smaller third pack is then scrutinized for severity, and easily dismissed if five episodes are insufficient. The first two 180 day packs may well be used as "background information", but not as elements of a current violation to allow recovery for the expired claims. By contrast, the Ninth Circuit will allow a jury to open and empty all three packages into a single trial record, and award relief for every act of groping tolerated by the employer.

B. The *Berry* Rule as Originally Formulated and First Tested:

In 1983, the Fifth Circuit was a leader, if not *the* leader, among the circuits in expanding the use of statute of limitations exceptions to protect the classes identified by Title VII as the historical victims of discrimination. The *Berry* decision relied upon Fifth Circuit precedents, and those of other circuits, in bolstering its jurisprudence that the EEOC administrative filing deadline could not be viewed as restrictively as a true statute of limitations, either in measuring the existence of a claim or the time for which a remedy could be awarded. The *Berry* court explained the following at 979-80, and in note 12:

> The courts, however, have frequently utilized the theory of a "continuing violation" in applying this limitation. This theory, the precise contours and theoretical bases of which are at best unclear, relieves a plaintiff who makes such a claim from the burden of proving that the entire violation occurred within the actionable period. To establish a continuing violation for these purposes it is said that the plaintiff must show "a series of related acts, one or more of which falls within the 180 day period. . . . " B. Schlei & P. Grossman, *Employment Discrimination Law*, 232 (Supp.1979); * * *
>
> * * *
>
> The theory may also be relevant to a plaintiff's remedy, for it has been stated that "once having shown discrimination continuing into the actionable period, . . . the plaintiffs may also recover for portions of the persistent process of illegal discrimination that antedated the limitations period. * * * Such recovery, however, has been limited to a period of two years prior to the filing of a charge with the EEOC. 42 USC § 2000e-5(g). * * *

In distinguishing the effect of the EEOC filing deadline from the temporal limitations on available remedies, the Berry court explained at note 12:

> This Court held in *United States v. Georgia Power Co., 474 F.2d 906, 922 (5th Cir.1973),* that the "limitations period" applicable to an award of back pay relief *was not the 180-day period (90 days at that time) in which an EEOC charge must be brought.* It held that Title VII was silent on the proper period and looked to the analogous state statute of limitations to determine what length of time was appropriate. As noted below, Congress amended Title VII in 1972 to limit back pay awards to a period of two years before the filing of a charge with the EEOC. *42 USC § 2000e-*5(g).

This invocation of *United States v. Georgia Power Co.*, effectively finding a statute of limitations of two years before even getting into the application of continuing violation theory to extend the reach of claims and remedies even beyond, is particularly important in understanding the *Berry* court's reasoning. The Fifth Circuit in *Georgia Power* decided as a matter of first impression for itself that, even prior to the 1972 amendments, the EEOC filing deadline could not be used to limit the claim for relief or the period for which damages were awardable. In rejecting the same argument now made by UAL in its petition, *Georgia Power* held as follows at 922-24 that the analogous two year state back pay limitations should control, and that in addition to the nature of a continuing violation, the discovery injury rule "too" could be considered:

> The limitations period to be applied under Title VII is a question of first impression upon which the statute itself is silent. Though private complaints must be filed before the EEOC within 90 days, we cannot agree with the company that this period is the proper measure. This deadline is designed primarily to enhance the possibility

> of informal, out-of-court resolution of employment discrimination complaints through prompt administrative action. It is in no sense a limitation on the period for which one may receive back pay relief. Employment discrimination may as readily be a continuing course of conduct as a single event. Then *too*, an affected individual may not be aware of the discriminatory impact of certain employment practices until a pattern emerges as a result of the cumulation of numerous events over a substantial period of time. The remedial purposes of the Act would be frustrated were financial redress to be always limited to the 90-day period preceding the filing of a complaint.
>
> * * *
>
> Title VII and similar statutes created new causes of action which did not exist at common law or under state statutes. In respect to those causes of action which have no close analogies in state law, civil rights statutes have generally been held governed by the limitation on liabilities created by statute. * * * However, where federal laws create rights to back pay as part of general remedial relief, courts have generally applied the appropriate state statute of limitations governing actions for unpaid wages.

Secondly, in relying upon the prior Fifth Circuit case of *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1309 (5th Cir.1980), the *Berry* court set the stage for use of the continuing violation theory to expand not just the timeliness of claims brought within the EEOC filing deadline, but to expand the timeliness of claims beyond the two year statute of limitations period. *Crawford* at 1309 (the page invoke by *Berry*). It is against this well-established jurisprudence in the Fifth Circuit that the meaning and application of the *Berry* factors should now be understood.

After the *Berry* court expressly traced its jurisprudence as rejecting the EEOC filing deadline as being synonymous with a statute of limitations, it grappled with the problem of how to decide what kinds and complexions of "discriminatory acts" are "related closely enough" to those raised in the EEOC charge. The object of the analysis was to determine whether acts or injuries occurring up to two year before the charge can fairly be understood to have been encompassed within the charge. The *Berry* court explained the factors were to be used *for identifying relatedness, not timeliness*. Under the facts of the case it was remanding, the inquiry concerned not an Equal Pay Act claim as such, but a Title VII claim of assignment of "unequal work" to the plaintiff, because of her sex. Her claim was that she was given a heavier workload than male professors throughout the entire period of her employment contract, both before, during and after the filing of her EEOC complaint. However, the *Berry* court viewed the record below as too incomplete *in understanding exactly which assignments, duties and responsibilities may have been unequal*, and which might have been equal with the male professors. The *Berry* court focused on the need for a record portraying the continuity and similarity of tasks, or conversely, which alleged tasks or assignments were not a part of the pattern at all, but might instead be "discrete acts". The *Berry* court explained at 980:

> The court correctly construed the discharge, *per se*, as not constituting a continuing violation which would have extended the time for filing. It was a discrete act of discrimination, and Berry was obliged to seek relief from it within the statutory 180-day period. *Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980); Chardon v. Fernandez, 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981).* Nor could the work load and salary discrimination alleged by Berry following LSU's decision not to rehire her, which are discussed below, transform this action

> into a continuing violation. * * * Similarly, LSU's failure to rehire was a discrete act which was not part of a continuing violation.

Instead, the *Berry* court looked to whether the unequal workload might be a "continuing violation in and of itself". The *Berry* court never even questioned the continuing actionability of any pattern which had continuity and similarity. For example, the *Berry* court noted that discriminatory compensation which repeated from one paycheck to another would be a continuing violation, irrespective of whether the employee knew from the first check that discrimination was at work. In such a case, the court would not be concerned with the EEOC filing deadline as limiting how far back the claim or remedy would reach – that would be the function of the statute of limitations (two years in Georgia). The *Berry* court stated at 980-981:

> To the extent that Berry's Title VII claim is not that she suffered salary discrimination of the Equal Pay Act variety, but "work load discrimination" *per se*, which we have held not to be actionable under the Equal Pay Act, we are unable to determine whether she has made out a continuing violation. * * * This issue, although raised by Berry, was not focused on by the parties or the court, leaving the record devoid of potentially important facts and legal argument on the point. Thus, we also remand the question of whether the "work load discrimination" of which Berry complains constituted a continuing violation extending into the 180-day period.

It was only at this point that the *Berry* court formulated the Fifth Circuit's three prong test, remanding the case for its application as a means of determining relatedness. The court stated at 981-82:

> Courts have not formulated a clear standard *for determining when alleged discriminatory acts are related closely enough* to constitute a continuing

> violation *and when they are merely discrete*, isolated, and completed acts which must be regarded as individual violations. * * * This inquiry, of necessity, turns on the facts and context of each particular case. Relevant to the determination are the following three factors, *which we discuss, but by no means consider to be exhaustive.* * * * As noted, the particular context of individual employment situations requires a fact-specific inquiry by a trial judge which cannot be easily reduced to a formula. We feel, however, that consideration of the above factors *will generally be appropriate*, and we leave their application here, as well as whether trial on the merits is required for their resolution, in the first instance to the district court.

(Emphasis added, citations and footnotes omitted.)

Had the *Berry* court used what is now called the "*Berry* rule", Professor Berry's Title VII "unequal work" claim would have easily been dismissed with the observations that this condition commenced, and was known and complained about by her long before the EEOC filing deadline. This result would have been repugnant to analysis of the *Berry* panel. Indeed, the first reported try out of the *Berry* rule within the Fifth Circuit resulted in a futile exercise of logic to give wide berth to the third prong in the context of a hostile work environment claim, and as with the *Fielder* decision, resulted in biting dissent against the majority for its obviously strained effort to avoid its application. That case was *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989), unmentioned by the petitioner, but cited by the majority in *Fielder* at 986. Like Ms. Fielder, Ms. Waltman was sexually harassed by male co-workers, and she complained about it to her supervisors repeatedly far outside of the EEOC filing deadline. Employer investigations and reprimands were undertaken, multiple offenders were involved, she demanded shift transfers away from harassers, workers

were assembled to learn the employer's sexual harassment policies, and the overt sexual acts ceased. These events all unfolded in 1982, 1983, and 1984, and until she finally resigned in 1985 after getting mental health treatment.

The district judge counted back the days from the EEOC filing, and arrived at cut-off date for actionability in October 1984, finding all of the acts in 1982, 1983 and the first ten months of 1984 to be stale. The *Waltman* majority, however, was undeterred by *Berry*, though giving that case great attention. First, the majority stopped just short of finding Berry inapposite and outdated by this Court's decided determination in the hostile environment arena, stating at 476:

> It is noteworthy that since this court's decision in *Berry*, the Supreme Court decided *Meritor Savings Bank*, which established that a plaintiff can bring a claim for sexual harassment based on acts that created a "hostile environment." The *Meritor Savings Bank* decision is relevant to the continuing violation theory because a hostile environment claim usually involves a continuing violation. In a hostile environment, an individual feels constantly threatened even in the absence of constant harassment. Thus, in looking at the frequency of harassment, the focus should not be a mechanical calculation. Rather, in light of *Meritor Savings Bank*, the court should review the pattern and frequency of the harassment and determine whether a reasonable person would feel that the environment was hostile *throughout the period that formed the basis of the plaintiff's claim.*

(Emphasis added.)

Secondly, the *Waltman* majority distinguished use of the third *Berry* prong as a measure of "permanence" between discrete single acts such as notification of denial of a promotion and the existence of a hostile work environment. It was at this juncture that the majority either

could not grapple with or tolerate use of the third prong to affirm dismissal of Waltman's multi-year ordeal. For in spite of clear evidence that Waltman had long since realized and complained about the hostile environment, and the failure of the employer to abate it, the majority refused to reverse, cryptically stating at 476:

> Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of promotion. If the person harassing a plaintiff leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies a plaintiff a promotion leaves, the plaintiff is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is an element of permanence to the discriminatory action, which should, in most cases, alert a plaintiff that her rights have been violated. We find that in the instant case, there is a material issue whether the acts of sexual harassment, had the *Berry* quality of "permanence" that would alert Waltman that her rights had been violated.

Understandably, the dissent found the majority to be easy prey on grounds of the *Berry* third prong if understood to be a factor of timeliness rather than relatedness, which is how the majority unfortunately discussed it. The dissent stated at 487, note 14:

> I also disagree with the majority's holding that Waltman may prove a continuing violation of Title VII so as to avoid its 180-day limitations period. The impact in this case is not significant, because one or two physical incidents involving her occurred within the 180-day period. *If her claims are actionable, no limitations bar exists.* The majority's holding, however, points up a serious inconsistency in Waltman's claim. How can she have been so *unaware* that her environment at IPCO was pervasively and severely hostile, that

> a continuing violation occurred? Unlike *Abrams v. Baylor College of Medicine, 805 F.2d 528 (5th Cir. 1986)*, and cases where the discriminatory conduct is hidden from the plaintiff, Waltman had to know that she was being psychologically abused. If she did not, the credibility of her claim diminishes.

(Emphasis added.)

Thus, like so many of the courts referenced in United's petition, the *Waltman* dissent used *Berry* factor three in shrink wrapping the victim's environment into two discrete packages on either side of the EEOC filing deadline. The first package standing alone was stale, and could thus be dismissed. The second package contained only "one or two physical incidents", and thus lacked the severity and pervasiveness when viewed standing alone. And, said the dissent, even if these physical incidents were severe enough, they still could not be used to link the first package with the timely second one, but would simply be actionable on their own.

C. The *Berry* Rule Two Decades Later in the Fifth Circuit: What is most significant about *Waltman* is not the majority's failure or refusal to apply the third factor, but how the dissent would have used it to isolate continuing hostile environment claims into discrete periods by deploying the *Berry* third prong as a dispositive discovery injury rule. Some circuits, including the Fifth Circuit in a recent case, have used the third *Berry* prong as a discovery injury rule which begins the clock running not on the last overt acts of harassment, but on the earliest ones. Petitioner puts heavy emphasis on *Webb v. Cardiothoracic Surgery Assocs. of N. Tex., P.A.*, 139 F.3d 532, 537 (5th Cir. 1998), and respondent does likewise to demonstrate how courts now deploy the *Berry* discovery injury prong to start the clock on hostile work environment cases *even before the unlawful employment practice claim has accrued* under Title VII. To understand the perversion of the *Berry* prong into a bar far more onerous than even the harshest application of the discovery injury rule, three

settled aspects of Title VII actionability must be highlighted.

(1) *Acts of Sexual Harassment and Co-Worker Retaliation are not Actionable Until the Employer Commits the "Unlawful Employment Practice" of Failing to Remedy*: It is by now well settled that even the most offensive sexual acts and the resulting hostile work environment are not actionable unless and until (a) the employer knows of, and (b) fails to take the necessary steps to remediate it. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998). As there is no employer vicarious liability for the unsanctioned acts of coworkers, the failure to remediate after chargeable knowledge of the hostile working conditions is an indispensable element of unlawful employment practice claims. As the court below stated in *Fielder* at 985: "Employers may be held vicariously liable for failing to remedy sexual harassment by employees when management knew or should have known of the harassing behavior." Indeed, Title VII restricts claims only to the "employer", and provides no cause of action against the co-employee harasser himself. *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587 (9th Cir 1993) ("Because Congress assessed civil liability only against an employer under Title VII, this court has held that "individual defendants cannot be held liable for back pay"); and *Gregory v. Daly*, 243 F.3d 687, 689 n. 1 (2nd Cir. 2001) (holding that individual supervisory employees may not be held liable under Title VII).

(2) *There is No Title VII Hostile Environment Claim Absent Both Objective and Subjective Severity:* While the subjective state of mind of the victim is a requirement of the severity factor, the severity element of hostile work environment has both a subjective and objective requirement. As the court observed in *Gregory v. Daly*, 243 F.3d 687, 691-92 (2nd Cir. 2001), an actionable hostile environment is one "(1) that is "objectively" severe or pervasive – that is, if it creates "an environment that a reasonable person would find hostile or abusive" [the "objective" requirement], * * * and (2) that the plaintiff "subjectively

perceives" as hostile or abusive [the "subjective" requirement]", citing *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993) ("Conduct that is not * * * objectively hostile or abusive * * * is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, * * * there is no Title VII violation.)

(3) *Neither the Discovery Injury Rule, nor any Other Time Trigger, Has any Application before the Unlawful Employment Practice is Complete*: Where federal statutes are silent on a limitations period, there can be competing principles and rules on what the period should be, and what events or knowledge are required to commence the clock. "How long is too long is, of course, a matter of judgment based on experience, and * * * Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue". *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Nonetheless, it is the simple but "cardinal principle that a limitations period does not begin to run until the cause of action is complete." *Rotella v. Wood*, 528 U.S. at 559, n. 4. That the discovery injury rule is effective upon "discovery of the injury, not discovery of the other elements of a claim" *Rotella v. Wood, 528 U.S. at 555, is immaterial where the "other elements" have yet to occur.*

With these hopefully solid premises in mind, it is stunning that the Fifth Circuit in Webb, and the petitioner here, unhesitatingly conclude that the third Berry prong can effectively begin the running of the Title VII limitations period simply when the plaintiff subjectively considers herself a victim, before she has even complained to the employer, where the employer brings prompt remedy to the complaint, and the cause of action is not yet complete. Here are the facts which the plaintiff in *Webb* at 535 alleged happened to her before she ever reported them to the employer such as to trigger employer liability:

> Webb alleges that Mack began sexually harassing her in the spring of 1991, when she began working as his secretary. * * * Mack's offensive conduct included touching Webb on the shoulder when he spoke to her and standing so close

> to her that he would rub against her shoulder. * * *
>
> In January of 1993, both Webb and Mack, together with other CSANT personnel, attended a business meeting in San Antonio. According to Webb, late one evening at a bar Mack approached her, hugged her, and whispered his hotel room number into her ear several times. Mack allegedly asked Webb to meet him there. Later, after everyone had left the bar and returned to the hotel, Mack telephoned Webb in her room and asked why she had not come to his room. * * *
>
> In February of 1993, Mack called Webb into his office. According to Webb, Mack asked her to close the door to the office and to sit on his side of the desk. Webb complied with this request. Mack then discussed several problems that he was having related to CSANT and conveyed to Webb that he was "feeling down." * * * Webb then stood to leave, at which time Mack thanked her for listening and allegedly placed his hand on her leg and touched the inside of her thigh under her skirt. Before January of 1995, Webb had not complained to any CSANT personnel regarding Mack's behavior.

Thus, no matter how serious this sexual harassment by Mack is considered to be, the law is clear that no Title VII cause of action for an unlawful employment practice could have been complete until Webb notified her employer or otherwise demanded relief. Yet, deploying the third *Berry* factor, the *Webb* court at 538 concluded as a matter of law that the Title VII limitations period was triggered by the unreported incidents in 1993:

> Here, the summary judgment evidence reflects that Webb was immediately aware of the severity of Mack's conduct in January and February of 1993. The district court based its decision on Webb's own deposition testimony describing

> her perception of Mack's conduct. Webb stated that she knew that Mack's January 1993 conduct was sexual in nature when he tried to get Webb to come to his hotel room in San Antonio. Further, she stated that she was offended by his behavior. Webb also understood Mack's conduct at the February 1993 meeting to be a sexual gesture. After this meeting, Webb was "shocked and frightened." Even if the January incident at the bar and hotel in San Antonio was insufficient to put Webb on notice that her employment might be affected by Mack's conduct, when the incident in Mack's office occurred only weeks later, Webb was on notice that Mack's conduct would affect her employment. Based on this factual predicate, we agree with the district court that Webb needed no additional facts after these two encounters to understand that Mack was sexually harassing her. Webb's full knowledge of Mack's acts in January and February of 1993 therefore triggered Webb's duty to assert her rights.

The court held the claim untimely despite the legal conclusion at 536 that "Dr. Mack could not be held individually liable because he did not qualify as an 'employer' under Title VII", without any express legal conclusion that the 1993 incidents met the objective requirement of severity and pervasiveness, despite the fact that she had not asked the employer to abate Mack's conduct, and with no analysis whatsoever as to whether any actionable hostile environment had ever existed, much less whether it persisted into 1995. Assuming the correctness of the recited facts, no limitation argument at all was necessary to dismiss Webb's claim. Instead, the court could have, and should have ruled that she substantively had no Title VII claim because no hostile environment existed at all either when she complained to the employer, or within the EEOC filing time. The court simply should have ruled that by the time she triggered

any employer responsibility with her complaints, no hostile condition existed for the employer to remedy.

Yet, it is precisely seizure on the illusory bright line of the third *Berry* factor that leads courts to ignore the most fundamental and substantive legal principles of hostile work environment claims. The trial court, and the petition in this case demonstrate exactly this pitfall. At page 13 of the petition, United correctly recites that:

> Unlike the plaintiff in *Webb*, who apparently did not appreciate during the limitations period that her supervisor's behavior might be violative of Title VII, Fielder specifically complained of sexual harassment to both her coworkers and her supervisor Bibler long before the limitations period ran. *Id.* at 58a. Shortly thereafter, Fielder retained an attorney, who advised United during the limitations period that he believed Fielder was being retaliated against. *Id.* at 4a-5a, 7a.

Neither the district court below nor the petitioner here gave any significance to the facts that she neither had nor claimed any right of action against United for an unlawful employment practice for the 1992 and 1993 *sexual conduct* of Chmelir or Reynolds precisely because United did remedy that conduct after she complained in February 1993. Instead, using the third *Berry* prong, petitioner argues the clock began running with the lawyer letters, irrespective that she had no action against either her individual co-worker or United at that time.

D. The *Berry* Rule and its Even More Harsh Applications in Other Circuits: The petition meticulously documents that the third *Berry* prong, or its analog, have predominated the limitations jurisprudence of several circuits, in some instances where the third prong, without more, is *the* test. The petition unabashedly depicts this, correctly referencing the third *Berry* prong as the "notice rule" it has become in its several variants, in the following analysis:

[*At page 14*:] The Third, Sixth, Tenth, and Eleventh Circuits have applied the *Berry* factors in the same manner as the Fifth Circuit, placing particular emphasis on the third factor – whether the degree of permanence was sufficient to put the plaintiff on notice of her duty to prosecute her claim.

[*At page 15*:] The First and Seventh Circuits, and the Federal Circuit in a related context, have each effectively boiled *Berry* down to a one-factor test that permits the continuing violation doctrine to be invoked only if a reasonable person in the plaintiff's position would not have immediately appreciated the unlawful nature of the conduct antedating the limitations period.

[*At page 12, note 2*:] The Second Circuit has not acknowledged the *Berry* test, but its own approach to the continuing violation theory closely parallels the three-factor *Berry* analysis. * * * See *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) ("There is no reason to defer the accrual of [plaintiff's harassment] claim to the time she received notice of all discrete acts that might make up her discrimination claim.").

[*At page 16, note 3*:] The notice rule of the First, Seventh, and Federal Circuits is consistent with this Court's "emphatic" guidance that causes of action accrue, and the limitations period begins to run, on the plaintiff's "discovery of the injury, not discovery of the other elements of a claim." *Rotella v. Wood, 528 U.S. 549, 555 (2000).*

[*At page 17*:] Under the notice rule of the First, Seventh, and Federal Circuits, evidence that the plaintiff perceived herself to be a victim of harassment before the limitations period expired will be fatal to a continuing violation claim.

Indeed, to show how far the *Berry* third prong is permeating the federal judiciary, petitioner identifies only one circuit as approaching the permissiveness of the Ninth Circuit, noting on page 18, note 4 the "last incident of harassment" rule of the Eighth Circuit.

III. THE SCOPE OF ANY "CONTINUING VIOLATION" EXCEPTION TO SECTION 706(E) IS AN IMPORTANT AND FREQUENTLY LITIGATED ISSUE, BUT THE TEXT AND LEGISLATIVE HISTORY OF TITLE VII ITSELF PROVIDES THE GUIDANCE FOR AFFIRMING THE DECISION BELOW

The petitioner is nowhere more incorrect than when it contends at page 20 that the "broad continuing violation exception adopted by the Ninth Circuit is inconsistent with the plain meaning and purpose of Section 706(e). The statute does not expressly provide an extended limitations period for continuing violations of Title VII." Furthermore, the petitioner is wrong in questioning whether "some limited form of a continuing violation exception could be grafted onto the statute" consistent with Congressional intent and this Court's precedents, other than "the doctrines of equitable tolling and equitable estoppel, and the discovery rule", and then only if "strictly enforced, subject only to certain narrow exceptions". *Ibid* at 22. No fair reading of this Court's cases can sustain the petition's assertion at page 23 that the Court "has consistently refused to recognize an equitable tolling rule, like the continuing violation rule of the court below, that would extend the limitations period for putative plaintiffs who knowingly fail to prosecute their claims in a timely fashion." Both the text of Title VII and the legislative history urge a far less restrictive approach than that urged by petitioner, and adopted by some circuit panels under the misguided constructions of the rule adopted by the *Berry* court in 1983.

This Court fundamentally must resolve the issues raised by the petition, today or another, by one of two approaches that currently predominate for making the complex and tough choices in limitations law. Judicial choices are necessitated because of Congress' venerated and determined view that the judicial branch is better situated than the legislative to wisely formulate and apply limitations rules of decision to effectuate the profound political, legal and cultural values insisted upon by this nation. Were Congress to have delegated this crucial governing power (*e.g.*, 42 USC sec. 1988) to the executive branch, this Court would be firm in its jurisprudence that the executive must vigorously embrace this delegated power. Yet, this Court is hesitant in accepting the delegation. The power is there, the legislative guidance is there. The Constitution has reserved Congress' legislative veto should the Court go too far, but as shown below, that veto has always been used when this Court hasn't gone far enough in permissively adjusting time limitations for effectuating civil rights values.

A. Congressional Guidance: In addition to its own initiatives in doubling EEOC filing deadlines from 90 to 180 days, with most plaintiffs being legislated into 300 day states, Congress has at least twice amended Title VII to reduce unjust case fatalities at the hands of restrictive time limitations.

(1) In 1972, Congress amended the 1964 Civil Rights Act to allow back pay awards to two years, preventing some courts from continuing to use EEOC filing deadlines as the limitations period *for what was then the only compensating money judgment a plaintiff could win. Act Mar. 24, 1972*, P.L. 92-261, 86 Stat. 113 (amending 42 USC sec. 2000e-5(g)(1)). It is this amendment, in conjunction with the delegation of 42 USC sec. 1988, that the Court should now find to be the federal two year statute of limitations for the award of any money judgment under Title VII (other than costs and fees), i.e., back pay and punitive damages provided under 42 USC sec. 1981a for non-economic injuries to Title VII plaintiffs. (See below.)

(2) With the Civil Rights Act of 1991, Congress amended 42 USC sec. 2000e-5(e)(2) to expand the time limitation within which an employee could challenge, and thereby be compensated for, a discriminatory seniority policy. Overruling *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), which held the EEOC filing deadline to be triggered on the date a facially non-discriminatory policy is "adopted", Congress dramatically extended the limitations trigger to the latest date of when the policy "is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application" of it. Congress was unpersuaded by the *Lorance* Court's balance of interests and rationale grounded in *Delaware State College v. Ricks*, 449 U.S. 250.

Also it must be noted that with the Civil Rights Act of 1991, Congress amended 42 USC sec. 1981 by adding a new remedy section, 1981a. Without any reference to the EEOC filing deadline provided in section 2000e-5(e)(1), section 1981a(a)(1) directed:

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 USC 2000e-5, 2000e-16) against a respondent who engaged in unlawful intentional discrimination * * * (42 USC 2000e-2, 2000e-3, 2000e-16), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

At the time this new damages remedy was enacted in section 1981a, Congress was presumably aware that this Court had already held that the statute of limitations for section 1981 actions would be the analogous state statutes, most of which are two or three years, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); and that a state

human rights agency's six month EEOC-type limitations period would be inappropriate in limiting section 1981 claims. *Burnett v. Grattan*, 468 U.S. 42 (1984).

B. Applicable Supreme Court Cases on Proper Approaches on Limitations Issues: This Court can either affirmatively adopt a period or rule of limitations, or eliminate one or more of those advocated by the circuits. Under the grant of power to this Court by 42 USC sec. 1988, the approach used to decide limitations periods and accrual rules in civil rights claims (sections 1983 and 1981) is to select one from an analogous federal statute, and only if one is unavailable, from state statutes. *Wilson v. Garcia*, 471 U.S. 261 (1985) ("First, courts are to look to the laws of the United States so far as such laws are suitable * * * . If no suitable federal rule exists, courts undertake the second step by considering application of state * * * law"). When deciding limitations periods and accrual rules under other federal statutes (including RICO, NLRA, and the Federal Tort Claims Act), this Court has usually engaged not in a process of selection, but one of explicit "elimination" from the diverse rulings of the circuits. *Rotella v. Wood*, 528 U.S. 554 (RICO); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) (RICO); and *United States v. Kubrick*, 444 U.S. 111 (1979) (Federal Tort Claims Act discovery rule), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983) (declining to apply a state statute of limitations to NLRA claim in favor of analogous federal statute). Respondent urges this Court to use the affirmative adoption approach, and borrow the back pay two year period as the effective statute of limitations *for all money judgments under Title VII*. Alternatively, the Berry third prong discovery rule should be eliminated in affirming the judgment below.

C. Applicable Supreme Court Cases on Continuing Violation Doctrine and Discovery: Contrary to the arguments of the petitioner, this Court has applied the continuing violation doctrine in civil rights cases, and did not allow a discovery rule to bar recovery. These cases are antithetical to petitioner's restrictive approach. In *Havens*

Realty Corp. v. Coleman, 455 U.S. 363 (1982), a fair housing organization deployed "testers" to detect racial "steering" over a period of several years by the defendant. This Court rejected the defendant's argument that the civil rights action was time barred under § 812(a) of the Fair Housing Act, 42 USC § 3612(a), which requires that a civil suit be brought within 180 days after the alleged occurrence. Although five different specific incidents were alleged, four occurred earlier than the 180 days limitations, and the housing organization knew of the discrimination from the earliest testing. Adopting a continuing violation theory triggered by a last act rather than a discovery rule, the Court held at 380-81:

> Where the challenged violation is a continuing one, the staleness concern disappears. Petitioners' wooden application of § 812(a), which ignores the continuing nature of the alleged violation, only undermines the broad remedial intent of Congress embodied in the Act, * * * [W]e therefore conclude that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), a state Extension Service previously divided into a "white branch" and a "Negro branch," were subsequently merged into a single organization, but, some disparities remained between the salaries of white and black personnel. Years later, some of the affected black employees sued under Title VII for back pay. This Court held that recovery could not be barred simply because the discriminatory salary structure existed even before Title VII was extended to state government employers in 1972. The Court termed the circuit court ruling to the contrary as "too obvious to warrant extended discussion", *id.* at 395, and held that: "Each week's paycheck that delivers less to

a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII."

Similarly in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 502 (1968), this Court rejected a limitations argument that an antitrust case must be filed within the prescribed limitations period, even though the damages repeated year after year. The Court held with a brevity that common sense yields:

> We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. * * * Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

CONCLUSION

The respondent seeks a denial of the writ of certiorari both because the decision below is correct, and because the petition fails to present the range of necessary questions for proper review. Alternatively, if the writ is granted, the additional questions enumerated above should be ordered to be addressed by the parties.

Respectfully submitted,

THAD M. GUYER
Counsel of Record
T.M. GUYER & FRIENDS, P.C.
225 West Main Street
Medford, OR 97501

(541) 773-9656

JUNE 2001